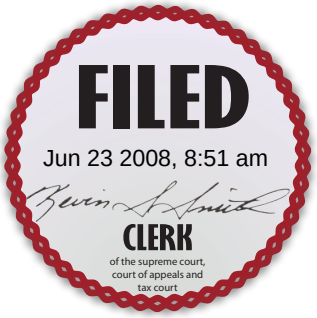

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IN THE
COURT OF APPEALS OF INDIANA

CARLOS RIVERA-HOOD,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 29A02-0803-CR-243
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Gail Bardach, Judge
Cause No.29D06-0704-FD-1748

June 23, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Defendant Carlos Rivera-Hood appeals his conviction, following a jury

trial, for Theft,[1] a Class D felony, and Illegal Consumption of an Alcoholic Beverage,[2] a Class C misdemeanor. Rivera-Hood contends that the trial court abused its discretion in failing to give his proposed instruction regarding the mistake of fact defense to the jury, and additionally, that the evidence was insufficient to support his theft conviction. Concluding that Rivera-Hood has waived any claim relating to tendered jury instruction and that the evidence was sufficient to support Rivera-Hood's theft conviction, we affirm.

FACTS AND PROCEDURAL HISTORY

On April 23, 2007, Guy Osborn was working as the third-shift attendant at a British Petroleum ("BP") gas station in Noblesville.[3] At approximately 2:00 a.m., Osborn was emptying the trash located near the pumps. As Osborn returned to the store to get additional trash bags, he noticed a tan minivan pulling up to Pump 5. At the time, the tan minivan was the only vehicle on the property. Osborn's cash register began beeping, which meant that somebody was trying to pump gas. Osborn activated the pump, collected the additional trash bags, went back outside, and continued changing the trash at the trash can located "right next to the pump that the tan minivan was at." Tr. p. 118. Rivera-Hood began pumping the gas, and when he finished, he jumped into the sliding side door of the van without paying for the gasoline. The van quickly drove away from the pump. As the van drove away from the

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[1] Ind. Code § 35-43-4-2(a) (2006).

[2] Ind. Code § 7.1-5-7-7(a) (2006).

[3] As the third-shift attendant, Osborn worked from 10:00 p.m. until 6:00 a.m.

property, Osborn wrote down the license plate number and immediately called the Noblesville Police Department.

Soon after receiving the call, Noblesville Police Officer Jeremy Stanley stopped the tan minivan. Approximately thirty minutes after the original theft, Officer Jason McDermott spoke to Rivera-Hood. Officer McDermott noticed that Rivera-Hood's eyes were red and glassy and that he smelled of alcohol. Rivera-Hood admitted that he had pumped the gasoline but claimed that he had paid with a credit card given to him by the driver of the minivan, James Curry. Officer McDermott questioned Rivera-Hood about the credit card that Rivera-Hood allegedly used to pay for the gasoline, but Rivera-Hood could not provide any details about the card, such as what it looked like, whose name was on the front, which bank issued it, whether it was a Visa or a Mastercard, or what the alleged pin number was. Police searched the minivan and found no credit cards, but they found that Curry had two credit-card-type cards, a Jillian's Player Card and a Kroger gift card.

The State charged Rivera-Hood with Class D felony theft and Class C misdemeanor illegal consumption of an alcoholic beverage by a minor. A jury trial was conducted on September 4, 2007. At the conclusion of the State's case-in-chief, the parties discussed the final jury instructions. Rivera-Hood requested that the trial court include an instruction stating that conversion is a lesser-included offense to theft. Rivera-Hood also requested that the trial court include an instruction outlining the mistake of fact defense. The State objected to the inclusion of the mistake of fact instruction. The trial court sustained the State's objection, finding that the mistake of fact instruction was not "properly stated" and that it

"call[ed] unwarranted attention to a fact." Tr. p. 166. Following the parties' discussions about the final jury instructions, the trial continued, and the jury found Rivera-Hood guilty as charged. This appeal follows.

DISCUSSION AND DECISION

I. Exclusion of Jury Instruction

Rivera-Hood contends that the trial court abused its discretion by excluding his tendered mistake of fact jury instruction. The State counters by arguing that Rivera-Hood has waived appellate review of this claim because he failed to include the instruction verbatim in the argument section of his brief as is required by Appellate Rule 46.

Appellate Rule 46(A)(8)(e) provides that "[w]hen error is predicated on the giving or refusing of any instruction, the instruction shall be set out verbatim in the argument section of the brief with the verbatim objections, if any, made thereto." The failure to comply with Appellate Rule 46(A)(8)(e) constitutes a waiver of the claimed error. *Lahr v. State*, 640 N.E.2d 756, 763 (Ind. Ct. App. 1994) (citing *Norris v. State*, 498 N.E.2d 1203, 1206 (Ind. 1986)), *trans. denied*. Here, Rivera-Hood did not include the tendered jury instruction in his appellate brief as required by Appellate Rule 46(A)(8)(e).[4] Indeed, Rivera-Hood failed to include it anywhere in the record at all. Because Rivera-Hood failed to comply with

[4] We note that, even though Rivera-Hood failed to include the tendered mistake of fact jury instruction in his brief on appeal, Rivera-Hood included Pattern Jury Instruction 10.11 in his appellate brief in order to demonstrate that the tendered jury instruction was a correct statement of the law. The record is clear, however, that Pattern Jury Instruction 10.11 was not the tendered jury instruction and that there were significant differences between the tendered jury instruction and Pattern Jury Instruction 10.11. Tr. p. 164-66. Therefore, Rivera-Hood's inclusion of Pattern Jury Instruction 10.11 in the place of the tendered jury instruction does not satisfy Appellate Rule 46(A)(8)(e).

Appellate Rule 46(A)(8)(e), he has waived his challenge to the exclusion of his tendered jury instruction on appeal.

II. Sufficiency of the Evidence

Rivera-Hood next contends that the evidence was insufficient to support his theft conviction. When reviewing the sufficiency of the evidence, we will not reweigh the evidence or judge the credibility of witnesses. *Alkhalidi v. State*, 753 N.E.2d 625, 627 (Ind. 2001) (citing *Harrison v. State*, 707 N.E.2d 767, 788 (Ind. 1999)). We only consider the evidence most favorable to the judgment and the reasonable inferences that can be drawn therefrom. *Corbin v. State*, 840 N.E.2d 424, 428 (Ind. Ct. App. 2006). Moreover, we will affirm the trial court if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. *Alkhalidi*, 753 N.E.2d at 627. Here, the evidence most favorable to the jury's verdict establishes that a tan minivan pulled up to Pump 5 at a BP in Noblesville, Rivera-Hood pumped gas, jumped in the minivan without paying for the gasoline, and the minivan drove away. Rivera-Hood argues that the evidence was insufficient to show that he intended to deprive BP of its gasoline. His argument is merely an invitation for this court to reweigh the evidence, which we cannot do. Upon our review of the record, we conclude that the evidence was sufficient to support Rivera-Hood's theft conviction.

The judgment of the trial court is affirmed.

BARNES, J., and CRONE, J., concur.